No. 87-1199

In The

Supreme Court of the United States

October Term, 1987

ABACUS MORTGAGE INVESTMENT COMPANY,
Petitioner,

v.

SUTTON PLACE DEVELOPMENT COMPANY, A FLORIDA CORPORATION, HENRY WEISS, AND CAROL WEISS,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents, Sutton Place Development Company[1], Henry Weiss and Carol Weiss respectfully request that the Petition for Writ of Certiorari to the Court of Appeals for the Seventh Circuit be denied.

REASONS FOR DENYING THE WRIT

The petition is based upon alleged conflicts between the judicial circuits respecting the "two dismissal" rule contained in Rule 41 (a) (1), Fed.R.Civ.P. By its characterization of the issues in the case the petitioner seeks to create a conflict where none exists. As part of this effort, it is claimed that the court of appeals used an inappropriate standard of review, and that the result is therefore wrong. These assertions are without merit. The court of appeals held that deviation from the plain language of Rule 41 (a) (1) is permissible only in extreme circumstances; that the party urging such a departure has an especially heavy burden, and the burden was not carried in this case. This holding does not create a conflict among the judicial circuits, and, in fact, the petitioner does not cite a single case which conflicts with the decision here.

STATEMENT OF THE CASE

In this case, the "second" dismissal occurred in an action respondents filed against Abacus Mortgage Investment Company (Abacus) in the district court in Chicago, pending before Judge James B. Moran. Abacus had not been served with process, nor had it filed an appearance in the matter, when respondents made a motion for dismissal and an order was entered dismissing the case without prejudice. But Abacus had full knowledge about the case before Judge Moran because as soon as it was filed Abacus moved in the bankruptcy court in Florida (where

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[1] Respondent Sutton Place Development Company is a Florida Corporation. It has no parent company, no subsidiaries and no affiliates.

respondents were in proceedings under chapter 11 of the bankruptcy code), to stop the respondents from prosecuting the action before Judge Moran. Abacus' motion was granted by the bankruptcy judge and prosecution of the case was abated. (R. 129, p. 3, Ex. 2).

Thereafter, respondents moved to vacate the abatement order, stating the request was made so they could proceed against Abacus in the Northern District of Illinois in a prior case pending before Judge Prentice H. Marshall. (R. 129, p. 4). Respondents informed the bankruptcy judge they were considering two alternatives, *viz*, dismissing the case before Judge Moran and joining Abacus as a defendant in the case pending before Judge Marshall (where these proceedings were born), or, consolidating the Judge Moran case into the action before Judge Marshall. (R. 134, pp. 9 and 10).

Abacus' counsel suggested to the bankruptcy judge that any order vacating the abatement order should specifically provide that it be for the purpose of dismissing the Judge Moran case. (R. 134, Ex. 1, p. 6). Respondents' lawyer objected to Abacus' suggestion on the ground that the purpose of respondent's motion was to permit respondents to litigate in Chicago. Respondents' counsel stated that dismissal of the Judge Moran case in the manner suggested by counsel for Abacus might be construed as precluding respondents from proceeding against Abacus in the Judge Marshall case. (R. 134, Ex. 1, pp. 6 and 10).

Abacus then agreed the abatement order could be vacated so that the respondents could dismiss the action pending before Judge Moran and assert the claims against Abacus in the case pending before Judge Marshall. (R. 134, pp. 9-10; Ex. 1., pp. 11-12). Abacus' counsel prepared an agreed order for the bankruptcy judge. (R. 129, p. 4, Ex. 3; R. 134, p. 12, Ex. 1). The bankruptcy judge entered the agreed order April 20th, 1984. (R. 129, p. 4). This order provides as follows:

> IT IS ORDERED that this Court's Order of January 17, 1984 directing debtors to abate their action (the "Action") [referring to the Judge Moran Case] . . . is vacated solely to enable debtors to dismiss the Action. This Order is without prejudice to debtors' rights including the assertion of the cause of action stated in the Action, in any litigation which is now pending.

(Petitioner's Appendix (P.A.) A-5; R. 129, Ex. 3 at 1-2).

On May 3rd, 1984, pursuant to the agreed order entered in the bankruptcy court, respondents' counsel appeared before Judge Moran and presented a motion to dismiss, requesting an order dismissing the action without prejudice, and Judge Moran entered this order. (R. 129, p. 5). Abacus had never appeared in the action before Judge Moran, so no notice of the motion was given to it. On May 22nd, 1984, respondents filed an amended complaint, with leave granted by Judge Marshall, joining Abacus as a defendant. (R. 57). In July, 1984, after it was served with process in the case before Judge Marshall, Abacus moved to dismiss, invoking the "two dismissal" clause of Rule 41 (a) (1). Judge Marshall granted this motion and later denied respondents' motion to reconsider. Abacus argued that even though the dismissal of the case by Judge Moran was on motion and by order that Judge Marshall should ignore what occurred and treat the motion and order as a Rule 41 (a) (1) notice of dismissal. While the district judge accepted this argument the court of appeals rejected it.

ARGUMENT

I. The Decision In This Case Does Not Create A Conflict In The Circuits

A. The Court Of Appeals Held That Deviation From The Plain Language Of Rule 41, Fed.R.Civ.P. is Proper Only In Extreme Circumstances

As the court of appeals said here, there is no dispute that the plain language of Rule 41 (a) (1) required reversal of the district court because the second dismissal of the claim was by motion and order. (P.A. A-7). Rule 41 (a) (1) specifically provides that a notice of dismissal (as opposed to an order entered pursuant to a motion) operates as an adjudication on the merits when it is filed by a plaintiff who has previously dismissed the same claim. In view of this clear and unambiguous language in the rule the court of appeals said a party who urges departure from the express language of the rule as petitioner does here, "bears a heavy burden," and that this burden is "especially heavy" in case of the "two dismissal" rule. (P.A., A-8). This is because the policy underlying the Federal Rules of Civil Procedure is to foster resolution of litigation on the merits; the "two dismissal" rule runs contrary to this objective.

Abacus failed to carry its "especially heavy burden" to convince anyone in the court of appeals, including the dissenting member of the panel, that the motion presented to Judge Moran, and the order he entered, should be deemed a notice of dismissal; or that the rule should be modified in this case, carving out an unwritten exception or amendment to Rule 41.

B. The Decision Of The Court of Appeals Is Consistent With The Cases From The Fifth And Eighth Circuits That Petitioner Claims Are in Conflict.

Despite the protestations of Abacus to the contrary the holding in this case does not conflict with decisions in the

fifth and eighth circuits, and the cases Abacus cites do not support it.

In Gioia v. Blue Cross Hospital Service, Inc. of Mo., 641 F.2d 540 (8th Cir. 1981), the plaintiffs took a voluntary dismissal of their first case, a state court action in which Blue Cross was a defendant. Then, in the second suit filed against Blue Cross, in federal district court, other parties sought to intervene. An interlocutory appeal was taken from an order denying intervention. Blue Cross fully briefed the interlocutory appeal in the court of appeals for the eighth circuit. Then on July 25, 1978, counsel for the plaintiffs wrote Blue Cross' attorney, stating that he intended to dismiss this second action and refile, naming additional parties. On the same day, plaintiffs, did in fact file a third action in the federal district court. At this juncture the plaintiffs had not taken steps to dismiss the second case. On August 7, 1978, plaintiffs' counsel, acting in the second suit, sent the clerk of the federal district court a document captioned "Memorandum for Clerk." A copy was sent to counsel for Blue Cross. The "Memorandum" stated, in part.

> "Comes now the plaintiffs . . . and by leave of Court, dismisses its complaint . . . without prejudice. . . ."

641 F.2d at 542.

The court of appeals noted that the "Memorandum" looked exactly the same as the document by which the plaintiff had dismissed the first suit, in the state court. In addition, the court of appeals observed that even though the "Memorandum" recited it was by leave of court, it was not addressed to the trial judge as a motion, and there was no order for the federal district judge to sign. Somehow, the "Memorandum" ended up on the district judge's desk and he wrote in the margin "So Ordered." The clerk's office sent a copy of the "Memorandum," signed by the judge, to counsel for Blue Cross. Counsel for Blue Cross did nothing with respect to this document. 641 F.2d at 542. Instead,

they filed a motion to dismiss the third action in the federal district court citing the "two dismissal" rule. This motion was granted. The district judge found the "Memorandum" was a notice of dismissal, and that the dismissal was not by court order.

The court of appeals stated counsel for the plaintiffs had not sought to present a motion and obtain an order. Everything suggested that counsel intended to dismiss the case by filing a notice, rather than by motion and order. The "Memorandum for Clerk" was not transformed into a motion and order by the fortuitous fact that the memorandum ended up on the desk of the judge and he wrote "So Ordered" in the margin. Accordingly, the two dismissal rule applied and the third action was barred.

Abacus also cites *Williams v. Ezell*, 531 F. 2d 1261 (5th Cir. 1976) as additional support for its contention that the decision here creates a circuit conflict. There, suit was filed in March, 1974, seeking injunctive relief. The court held a hearing, denied injunctive relief and dismissed the complaint. In April, 1974, the plaintiffs moved for a rehearing, and in June, 1974, the motion was granted in part. The trial judge vacated the order denying a permanent injunction, and agreed to have a hearing, In July, 1974, the plaintiffs filed a motion for dismissal, seeking to dismiss the action without prejudice. The district judge denied the motion to dismiss; he also reinstated the order of March, 1974, which had denied the injunctive relief sought, and taxed costs against the plaintiffs. In October, 1974, on motion of the defendants, the judge awarded attorneys' fees. After fees were assessed the plaintiffs appealed.

At the time the motion to dismiss was filed in July, 1974, the defendant had not answered, nor had it filed a motion for summary judgment. The court of appeals said there was no question but what the plaintiffs were acting under Rule 41(a)(1) when they sought to dismiss. Accordingly, the plaintiffs had an absolute right to dismiss the action. The district judge had no power to attach condi-

tions to the dismissal under the circumstances. This is the holding of the case. It is not in conflict with the decision here because it deals with a different set of circumstances which can arise under Rule 41. The case does not in any respect support the "two dismissal" argument advanced by petitioner here. Indeed, the principle is consistent with both the decision of the court of appeals in the instant matter, and with policy underpinning the Federal Rules of Civil Procedure, namely, resolution of cases on the merits rather then summarily.

In the case at bar, the respondents sought and obtained leave of the bankruptcy court to dismiss the case before Judge Moran so that the claims could be joined in the action on Judge Marshall's calendar. Abacus agreed to this procedure. A motion was presented to Judge Moran, and he entered an order, specifically dismissing the action without prejudice. (P.A., A-6). The respondents did not file a notice of dismissal, nor did they proceed before Judge Moran in any way not consistent with presenting a motion to dismiss and having a court order entered. This was the course of events which was fully discussed and agreed to in the bankruptcy court. (P.A., A-9, 10, fn. 4).

C. The Decision Of The Court Furthers The Policy Objectives Of The Federal Rules Of Civil Procedure

Abacus distorts the record in an effort to support its assertion that respondents harassed and abused Abacus and that respondents have attempted to avoid a trial on the merits of their claims against Abacus. This is the most curious argument. The record shows that plaintiffs have persisted in their efforts against Abacus, and, as the court of appeals observed, respondents sought to bring all of their claims together in the action before Judge Marshall, to consolidate their Chicago-based litigation, not to harass Abacus. (P.A., A-9).

The first dismissal of Abacus took place in a state court case pending before Judge Reginald Holzer. The

respondents made a record before Judge Marshall as to why the state court action was dismissed. This included reference to the federal criminal proceeding against Judge Holzer, and the specific reference in the Holzer indictment to the state court case respondents first dismissed. (R. 138, Ex. 1, pp. 16 and 17). The second dismissal occurred after Abacus agreed in the bankruptcy court to dismissal of the case pending before the Judge Moran case and refiling against Abacus before Judge Marshall.

In the court of appeals Abacus argued that the dismissal should stand because the respondents were acting improperly in suing Abacus, that Abacus was being harassed. This argument was given the weight it deserved by the court of appeals, which said:

> "It was clear to all that Sutton Place was seeking dismissal of the suit before Judge Moran – not to harass Abacus, but to consolidate its Chicago-based litigation." (P.A., A-9).

Moreover, the court of appeals said that while Abacus' counsel did not specifically waive reliance on the "two dismissal" rule in the bankruptcy proceedings just referred to, he "... was quite aware of the [respondents] course of action and the reasons for it and represented to the bankruptcy court that he would not object." (P.A. 9. fn. 4).

In effect, Abacus asserted that it was not bound by what its attorney had agreed to in the bankruptcy court because the agreement was not in a written stipulation. This effort of Abacus to repudiate the agreement made by its lawyer in bankruptcy court was rebuffed by the court of appeals.

II. The Court of Appeals Did Not Abuse Its Power of Review

A. Under Any Standard Of Review The District Court Was Clearly Wrong And Reversal Was Appropriate

Abacus asserts the court of appeals erred in its Rule 52 review of the district court dismissal. Specifically, Abacus contends that the court of appeals erred in ruling that the district court's decision of waiver presented mixed question of law and fact, subject to independent review by the court of appeals. Abacus argues the issue of waiver is solely a question of fact subject to review only under the clearly erroneous standard, and that the majority therefore erred in reversing the district court.

The simple response to that argument is that the court of appeals found that even if the "clearly erroneous" standard was to be applied, the district court's decision finding that Abacus did not waive reliance on the two dismissal rule was clearly erroneous. (P.A., A-9, fn. 4). Abacus apparently recognizes that fallacy in its premise because it also argues that the court of appeals erred in finding Judge Marshall's decision clearly erroneous. The thrust of this argument is that because the majority said Abacus "did not explicitly waive reliance on the 'two dismissal' rule ..." (P.A., A-9) the majority could not properly find the district court decision to be clearly erroneous, and, consequently, reversal was wrong.

Even if the standard of review for the court of appeals in this case was "clearly erroneous," rather than "independent review," there is more than adequate basis to support the decision. 9 C. Wright & A. Miller, *Federal Practice and Procedure*, §2585, p. 731 (1971) cites *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) "as containing the definitive test":

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Waiver is the intentional relinquishment of a known right. It was not inconsistent for the court of appeals to conclude that Abacus did in the bankruptcy court was intentionally relinquish a known right, even though not explicitly. Explicit and intentional are not synonymous. Waiver of a right may occur by conduct which is inconsistent with an intention of enforcing the right. It need not occur expressly. *Saverslak v. Davis-Cleaver Produce Co.*, 606 F.2d 208, 213 (7th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980). Indeed, as the court of appeals made clear, Abacus was fully apprised of respondents' objectives and the procedure to be followed and Abacus' attorney told the bankruptcy court "he would not object." (P.A., A-9, 10, fn. 4). Under the reasoning of Abacus, the agreement Abacus made in bankruptcy court could not waive its rights in these circumstances unless it said something like "In addition to the foregoing agreement, we hereby waive all rights we may possess under Rule 41." According to Abacus its agreements made in court are not binding unless written. This position was rejected by the court of appeals.

In this action, the express language of Rule 41 required reversal of the district judge. The conduct of Abacus in the action in moving to dismiss on the basis of there having been two dismissals within the meaning of Rule 41. Moreover, the decision of the court of appeals makes clear that Abacus' counsel cannot enter into agreements in one court and blithely repudiate them in another courtroom in a different city.

The behavior of Abacus in the matter was more than sufficient to support the court of appeals in holding that the district judge was clearly wrong, whatever standard might be applied to review of his decision.